IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Plaintiffs,

v.

DONALD EVANS, et al.,

Defendants.
/

No. C-02-3805-EDL

ORDER ON PARTIES' REQUESTS TO STRIKE EXTRA RECORD DOCUMENTS SUBMITTED IN CONNECTION WITH CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this litigation brought under various federal environmental laws, the parties filed cross-motions for summary judgment on April 15, 2003. On June 24, 2003, the parties filed supplemental briefing on the admissibility of extra-record documents submitted in connection with the cross-motions for summary judgment. This order addresses the parties' requests to strike the extra-record material. A separate order addresses the merits of the cross-motions for summary judgment.

A. Legal Standard

"Judicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court." Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996). The Ninth Circuit

> has only allowed extra-record materials: (1) if necessary to determine "whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," or (3) "when supplementing

> the record is necessary to explain technical terms or complex subject matter." Extra-record documents may also be admitted "when plaintiffs make a showing of agency bad faith."

Id. (citations omitted). Each side argues that the other side has improperly sought to supplement the record with material that the Court should not consider.

B. Declarations of Joseph Johnson, Captain L.T. Bortmes, Captain Gregory M. Vaughn, Vice Admiral Robert Willard, Vice Admiral John B. Natham, and Rear Admiral John B. Padgett III

The declarations of Joseph Johnson, Captain L.T. Bortmes, Captain Gregory M. Vaughn, Vice Admiral Robert Willard, Vice Admiral John B. Natham, and Rear Admiral John B. Padgett III, submitted by defendants, relate to assessing the harm to the public interest if the Court should issue an injunction. "The analysis of the existence and magnitude of potential harms includes all evidence admitted at the hearings." NRDC v. United States Dep't of the Navy, 857 F.Supp. 734, 736, n.2 (D.C. Cal. 1994). "In making this decision, the Court is not limited to the administrative record." Id. Therefore, the Court will consider these declarations in assessing how the issuance of an injunction may harm the public interest.

C. Declaration of Craig Johnson

Defendants contend that Craig Johnson's declaration explains technical terms or complex subject matter involved in the agency action. Plaintiffs respond that Craig Johnson's declaration does not explain scientific or technical information, but instead constitutes Johnson's legal analysis and explanation for agency behavior that is unsupported by the record. See Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984) ("additional information should be explanatory in nature, rather than a new rationalization of the agency's decision, and must be sustained by the record"). In Lowry v. Barnhart, 329 F.3d 1019, 1024-25 (9th Cir. 2003), a Social Security case, the Ninth Circuit rejected an attempt to submit evidence on appeal that was not part of the district court record. The Court explained that, "[i]t's certainly conceivable that [the letter] was the natural terminus of a three-and-a-half year review process, but its timing creates at least some appearance of a connection between appellees' need for the evidence and its sudden materialization." Id. at 1025.

In his declaration, Craig Johnson explains that NMFS' failure to make a "not likely to adversely affect" determination for green, hawksbill, and leatherback sea turtles was an oversight. (C. Johnson SJ Dec. ¶ 9.) Craig Johnson notes that "[t]he May 30, 2002, biological opinion has since been revised to correct this oversight by including the conclusions 'not likely to adversely affect' for each of the critical

habitat designations for sea turtles and a summary of the reasons for those conclusions." (C. Johnson SJ Dec. ¶ 9.) Moreover, Craig Johnson rationalizes NMFS' failure to include an incidental take statement in the May 30, 2002 biological opinion, explaining that he treated the May 30 biological opinion like a "Plan-level" biological opinion, which he contends does not include incidental take statements, and he treated the August 16 2002 biological opinion like a "project specific biological opinion," which he contends does include incidental take statements. (C. Johnson SJ Dec. ¶ 10-12.) Finally, Craig Johnson discusses NMFS' failure to provide numerical estimates of take for Pacific salmon, sea turtles, western Pacific gray whales and Hawaiian monk seals in the August 16, 2002 biological opinion. (C. Johnson SJ Dec. ¶ 13-14.) The Court finds that, rather than merely explaining technical terms or complex subject matter, Johnson's declaration improperly attempts to correct omissions in the record after the fact and provide post-hoc rationalizations.

Defendants further argue that Craig Johnson's declaration is admissible to show that NMFS relied on documents or materials not included in the administrative record. See Southwest Center for Biological Diversity, 100 F.3d at 1450. According to defendants, Craig Johnson's declaration introduces NMFS guidance that, while relied upon, was not included in the compilation of the administrative record because it is general background material that is not unique to the SURTASS LFA consultation.

> If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision. Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record.

Asarco, Inc. v. United States EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). Here, Johnson's declaration goes to the correctness, rather than the background, of NMFS' decision. Accordingly, the Court will not consider it.

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D. Declarations of Dr. Myrgerg and Dr. Popper and Rebuttal Declaration of Dr. Turnpenny

On May 16, 2003, ten months after promulgation of the Final Rule and seven months after issuance of the Preliminary Injunction, the Navy provided Dr. Myrgerg and Dr. Popper with a copy of the research report by Turnpenny et al., 1994, and asked that they review the study, as well as Dr. William Ellison's

January 24, 1996 comments thereof, and provide comments. (Myrberg Dec. ¶ 3; Popper Dec. ¶ 3.) Defendants contend that Dr. Myrberg and Dr. Popper's declarations explain technical terms or complex subject matter. However, neither Myrberg nor Popper were aware of the Turnpenny report at the time of their involvement as a reviewer of the Environmental Impact Statement. (Myrberg Dec. ¶ 3; Popper Dec. ¶ 3.) Therefore, as these declarations provide "a new rationalization for the [Navy's] decision" not to share the Turnpenny study with its scientific experts or discuss the study in the biological opinions, the Court will not consider them. Kunaknana, 742 F.2d at 1149.

At the hearing, plaintiffs submitted a declaration by the author of the Defense Research Agency Study, Dr. Turnpenny, which specifically responds to Dr. Myrberg's and Dr. Popper's criticisms. As discussed in the Summary Judgment Order, the Court did not consider Dr. Myrberg's or Dr. Popper's extra-record declarations. Therefore, the Court will not consider Dr. Turnpenny's response thereto.

E. Declaration of Commander Roncalto

Defendants contend that Commander Roncalto's declaration responds to plaintiffs' assertion that the 2002 stranding in the Canary Islands is additional evidence that LFA sonar will cause harm. As plaintiffs do not object to this declaration, the Court will consider it.

F. Declarations of Joseph Johnson, Dr. Darlene Ketten, Dr. Peter Tyack, Dr. Christopher Clerk, Dr. Kurt Fristrup, Dr. Edward Cuday, and Dr. William Ellison

Defendants contend that the declarations of Joseph Johnson (April 15, 2003 and September 26, 2002), Dr. Darlene Ketten, Dr. Peter Tyack, Dr. Christopher Clark, Dr. Kurt Fristrup, Dr. Edward Cudahy[1], and Dr. William Ellison relate to the issues of purported harm to marine life and the remedy. As plaintiffs do not object to these declarations, the Court will consider them.

G. Declaration of Kenneth Hollingshead

Defendants argue that Kenneth Hollingshead's declaration fits the exception allowing an explanation of agency process and technical material. As plaintiffs do not object to this declaration, the Court will consider it.

H. Declaration of Dr. Rodney M. Fujita

[1] Dr. Cudahy's declaration rebuts plaintiffs' allegations regarding potential harm to human divers and provides an explanation of the highly technical summary of the human diver study that is already in the administrative record.

Plaintiffs contend that they submitted the declaration of Dr. Rodney M. Fujita to show relevant facts not considered by the agencies. According to plaintiffs, defendants failed to address relevant information regarding the propriety of Longhurst as a model for specified geographic regions under the Marine Mammal Protection Act, 16 U.S.C. § 1361, regardless of their admission that Longhurst is an imperfect model for use in this instance. Plaintiffs explain that, because defendants relied heavily on Longhurst while failing to acknowledge alternative mapping schemes, plaintiffs submitted the Fujita declaration to show the Court that alternatives exist. Thus, plaintiffs contend, the declaration is admissible to show that the agencies did not consider all relevant factors when drafting the Final Rule.

The exception applies "if necessary to determine whether an agency has considered all relevant factors and has explained its decision." Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). The emphasis is always on information that was available to the agency at the time the decision was made. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 554 (1978). The Supreme Court has explained that:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

Id. (quoting ICC v. Jersey City, 322 U.S. 503, 514 (1944)) (ellipses and brackets in original). Fujita's "preferred habitats" theory was neither presented to NMFS during the comment period on the Final Rule, nor otherwise available for NMFS to review at that time. Therefore, defendants could not have been expected to consider his recent proposal as an alternative to the Longhurst model. Therefore, the Court will not consider the Fujita declaration.

I. March 1, 2000 e-mail from Dr. Robert Gisiner

Plaintiffs have submitted a March 1, 2000 e-mail message from Dr. Robert Gisiner (Marine Mammal Program Manager at the Office of Naval Research) to Marsha Green. (Sabey Dec. Ex. 9.) Dr. Gisiner's e-mail specifically expresses the need for the Navy to further study beaked whale populations, a task that was apparently never undertaken. Plaintiffs contend that this e-mail further demonstrates that NMFS and the Navy were aware of potential impacts on beaked whales but failed to adequately address

these impacts in the Final Rule, despite the urging of the Navy's own staff scientist. Plaintiffs further contend that this e-mail should have been included in the original record.

Dr. Gisiner's e-mail was available to defendants during the decision-making process and it demonstrates defendants' failure to consider all relevant factors. Moreover, defendants did not argue against inclusion of this e-mail. Therefore, the Court will consider Dr. Gisiner's e-mail.

J. September 27, 2002 e-mail message from Dr. Robert Gisiner, declaration of Theodore Postol, declaration of Jean-Michel Cousteau, declaration of Arthur Abbot, a PowerPoint presentation on the impacts of LFA on marine mammals authored by John Hildebrand, a 2002 article by A. Fernandez *et al*. entitled *Pathological Findings in Beaked Whales Stranded Massively in the Canary Islands*, a report from the 17th Conference of the European Cetacean Society, a 2002 study detailing damage to fish caused by anthropogenic sound authored by McCauley *et al*., a 2003 report published by the World Conservation Union, a Los Angeles Times article by Kenneth Weiss entitled *World Sonar Tests a Likely Link to Whales Deaths*, a Bremerton Sun article by Chris Dunagan entitled *Navy Sonar Incident Alarms Experts*, and a Herald Net article by Brian Kelly entitled *Sonar Suspected in Porpoise Deaths*.

Plaintiffs contend that the following documents were submitted to assist the Court in balancing the harms, a task that is not limited to review of the administrative record: a September 27, 2002 e-mail message from Dr. Robert Gisiner to Karen Kohanowich and Frank Stone; a declaration by Theodore Postol, a declaration by Jean-Michel Cousteau, a declaration by Arthur Abbot, a PowerPoint presentation on the impacts of LFA on marine mammals authored by John Hildebrand, a 2002 article by A. Fernandez *et al*. entitled *Pathological Findings in Beaked Whales Stranded Massively in the Canary Islands*, a report from the 17th Conference of the European Cetacean Society, a 2002 study detailing damage to fish caused by anthropogenic sound authored by McCauley *et al*., a 2003 report published by the World Conservation Union, a Los Angeles Times article by Kenneth Weiss entitled *World Sonar Tests a Likely Link to Whales Deaths*, a Bremerton Sun article by Chris Dunagan entitled *Navy Sonar Incident Alarms Experts*, and a Herald Net article by Brian Kelly entitled *Sonar Suspected in Porpoise Deaths*. As discussed above, the Court is not limited to the administrative record in its analysis of the existence and magnitude of potential harms. NRDC, 857 F.Supp. at 736, n.2. Therefore, the Court will consider these documents to the extent that they are cited to support plaintiffs' balance of the harms argument.

Defendants point out that the Abbot declaration offers a competing expert opinion about the validity of the Turnpenny study, the conclusions that can be drawn from it, and the weight given to its results. (Abbot Dec. ¶ 10-16, 18.) However, as discussed above, the Court will only consider the Abbot

declaration to assist in its analysis of the potential hardships resulting from a permanent injunction.

Plaintiffs contend that, in addition to discussing environmental harm from SURTASS LFA, the 2002 McCauley Study, the Fernandez Study, the 2002 e-mail from Robert Gisiner to Karen Kohanowich, and the Abbot Declaration are admissible as responses to defendants' amended biological opinion. Plaintiffs point out that defendants have not prepared an administrative record relating to this newly-revised biological opinion. As many of these documents would be included in an administrative record for a challenge to the revised biological opinion, plaintiffs contend that, if the Court chooses to consider defendants' revised biological opinion, it should also consider the documents and other evidence that respond to those revised opinion. The Court considered whether the amended biological opinion reflected a reinitiation of consultation, triggering a renewed obligation to consider new or previously undisclosed evidence concerning the impacts of high intensity sound on endangered fish or the widespread strandings of marine mammals exposed to intense sound. Because the Court concluded that the revised biological opinion does not reflect a reinitiation of consultation, however, an updated administrative record was unnecessary. Therefore, the Court did not consider the documents submitted by plaintiffs for the purpose of determining the adequacy of the revised biological opinion.

K. Second Letter of Authorization Application

At the hearing, defendants submitted the Navy's application to NMFS for a second letter of authorization as defendants' Exhibit A. Defendants contend that the application is not extra-record because it is evidence of NMFS' implementation and effectuation of the commitments it made in the Final Rule. As discussed at the hearing, the Court will consider the application for a second letter of authorization with respect to remedy but not with respect to the merits.

L. Plaintiffs' Supplemental Standing Declarations

Defendants argued for the first time at the hearing that plaintiffs lack standing with respect to fish. At the hearing, plaintiffs requested a chance to submit additional declarations on this issue. On August 6, 2003, plaintiff filed four supplemental declarations, to which defendants do not object. (Annie Notthoff Dec., Steve Simmons Supp. Dec., Mark Spalding Supp. Dec., Edward Cassano Supp. Dec.) The Court will therefore consider these declarations.

IT IS SO ORDERED.

Dated: August 26, 2003

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ELIZABETH D. LAPORTE
United States Magistrate Judge